Supreme Court, U.S.
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No. 99-161

In the
Supreme Court of the United States
October Term, 1999

Chad Weisgram, et al.

Petitioner,

vs.

Marley Company, et al.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT

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Introduction

Respondent Marley respectfully submits this supplemental brief pursuant to Supreme Court Rule 25(5) to bring to the attention of the Court new matter that was not available in time to be included in respondent's brief on the merits. The purpose of this supplemental brief is to inform this Court of certain concessions and statements made by counsel for the plaintiffs during the oral argument in the Eighth Circuit Court of Appeals. These concessions and statements are directly contradictory to statements in petitioner's brief on the merits.

Transcript of Oral Argument was not Previously Available

After receiving petitioner's brief on the merits, counsel for respondent attempted to obtain a transcript of the petitioner's oral argument in the Eighth Circuit Court of Appeals. The appellate clerk advised that no transcript was available, but that the argument had been recorded on audiotape. Marley counsel requested a duplicate of the audiotape, but the first tape received was not audible. At counsel's request, the clerk duplicated the tape again and sent another copy. The second tape was, again, partially inaudible. Marley counsel sought help from the court reporter for the United States District Court for the District of North Dakota, Southwestern Division, in Bismarck. The reporter worked with the tape on his equipment and was able to transcribe petitioner's argument. Marley counsel received the transcript from the court reporter on Monday, December 13, 1999, after respondent's brief had been filed. The full text of the argument is in the appendix to this brief.

Statements in Petitioner's Brief on the Merits

Petitioner's brief contains the following assertions in his Statement of the Case at page 12:

1. "The petitioner maintained at trial that the Weisgram heater contained *several serious design defects* which were noticed after the fire and which combined to cause the fatal fire." (emphasis added)
2. *High-limit - "One design defect* was in a safety feature: the placement of the high-limit control capillary tube within the heater enclosure . . ." *Id.* (emphasis added)
3. *Thermostat* - "There were two defects involving the regulating thermostat; first, the movable arm contact in the regulating thermostat contained unusual serrations from the manufacturing process which limited the contact area for electricity; and second, the contacts themselves 'mated' only partially, or in one quadrant of their contact area. These *design defects* promoted arcing and material transfer." *Id.* (emphasis added)

Statements in Petitioner's Oral Argument in the Court of Appeals

During the oral argument in the Eighth Circuit, the panel questioned the plaintiffs' attorney about his theory of product defect and the basis for it. Counsel made the following concessions and statements:

1. "Lazarowicz never talked about a design problem in this case." *Tr. of o. arg.* at 4 (A-4)
2. "We never claimed that the high-limit control was defective." *Id.* at 5 (A- 4-5)

3. "We never said that the high-limit control failed." *Id.* at 13 (A-10)
4. "We're not claiming that there was a design problem in the case." *Id.* at 19 (A-14)
5. "We're not claiming that there was necessarily a design defect for all these heaters." *Id.*

The Eighth Circuit panel majority recognized the inconsistencies in counsel's position and noted the contradictions inherent in plaintiffs' theories of liability in its opinion at footnotes seven and eight:

> *note 7:*
> At oral argument, counsel for plaintiffs said the high limit control was not defective and did not fail, but simply did not shut off the heater when it should have. It is not clear to us, then, what the plaintiffs' theory of liability now is. We continue with our analysis, however, under the theory submitted to the jury: strict products liability because of a design or manufacturing defect.
>
> *note 8:*
> Dolence testified that the heater was *not* defectively designed, but that it may have had a manufacturing defect that he simply could not identify. Lazarowicz testified that the defects *were* in the design of the heater the serrated contacts on the thermostat and the placement of the high limit control sensor but he also said there was *no* design defect in the high limit control. These contradictions from the plaintiffs' own witnesses are yet another indication that the jury reached a finding that the heater was defective only by engaging in speculation. (emphasis in original)
>
> *Weisgram v. Marley Co.*, 169 F.3d 514, 521-22 (8th Cir. 1999).

Conclusion

Petitioner's statements to this Court in his present brief at page 12 that the heater had "several serious design defects" cannot be reconciled with counsel's concessions to the court of appeals during oral argument.

Respectfully submitted.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent,	)	
Appellee,	)	
vs.	)	No. 97-3735
Marley Company, a Delaware Corporation and its subsidiary, Marley Electric Heating Company, a Delaware Corporation; United Dominion Industries, Inc., a Delaware Corporation,	)	
Appellants.	)	

TRANSCRIPT OF ORAL ARGUMENT

BY MR. DUNN

Taken At
United States Courthouse
Fargo, North Dakota
November 16, 1998

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(The following proceedings were transcribed from an audiotape recording made at the time and place hereinbefore indicated:)

JUDGE BRIGHT: Mr. Dunn.

MR. DUNN: Thank you, Your Honor.

May it please the Court. Counsel.

At the trial of this case, the parties presented two separate and distinct theories or reasons for why this fire happened. I don't have to spend a lot of time explaining their rational for what happened. That's not the point here. The point here is that the jury adopted the plaintiff's theory of what happened. This Court must accept that.

JUDGE BRIGHT: Well, we don't have to accept it if it's based on witnesses whose testimony cannot be deemed reliable, whether it's under the test of -- the Daubert test or other law. And what your point is saying essentially is, particularly the metallurgist, his testimony just didn't stand up in light of the examination and testing of the component parts after the accident -- the fire. Now what do you say to that?

MR. DUNN: You bet. There are two points I would like to make, Your Honor. Number one, the heater was destroyed by this fire. That heater didn't work afterwards. The component parts -- the plastic that held the component parts together -- were burned in the fire. What we found after the fire, we found the contacts, we found the spring arm, but they weren't together. There was no way to test the regulating thermostat -- and that's the thermostat that turns the heater on and off -- and the pilot controls to determine whether those things actually worked.

What we were forced to do is look at the component parts -- the physical evidence -- through a stereoscopic microscope, an electron microscope, and see what those

physical contacts told us. That's why Lazarowicz is in this case. Dolence didn't have access to these. Freeman didn't have it. Lazarowicz is a metallurgist. These contacts are made of silver. Obviously, a metallurgist can talk about the properties of silver. We never -- and part of the frustration in this case is that the parties seem to be talking past each other. Lazarowicz never talked about a design problem in this case. This case was about trying to figure out why that heater started on fire. We don't care about the other heaters that are out there. We don't care about the design problem. We want to figure out why this one started on fire. That's why Lazarowicz testified. And what he testified -- you bet.

JUDGE MAGILL: On Lazarowicz's testimony, you say he never testified about the design situation.

MR. DUNN: Correct, Your Honor.

JUDGE MAGILL: I refer to page 33 of the red brief. Do you join in that brief?

MR. DUNN: I do, Your Honor.

JUDGE MAGILL: Would you get the red brief? The high limit --

MR. DUNN: Excuse me?

JUDGE MAGILL: The high limit is not there.

MR. DUNN: Correct, Your Honor.

JUDGE MAGILL: The problem was the placement of the high limit control within the heater enclosure.

MR. DUNN: Correct, Your Honor.

JUDGE MAGILL: And it's behind the deflector shield at the top of the heater. The high limit control did not sense -- it didn't measure for high temperature in and around the heater until it was too late. That is not testimony on design?

MR. DUNN: That is an explanation for why the high limit control did not work in this case. We never claimed that

the high limit control was defective. What we were saying is that it did not work in time. In other words --

JUDGE MAGILL: What you say in the brief. You say it was misplaced by design during manufacture.

MR. DUNN: And I guess I don't read it to be that way, Your Honor. I would read it to be an explanation of why the high limit control did not work as it was intended to at the time of the fire, because what happened here, what we are alleging, is that the regulating thermostat -- that's the thermostat that turns the heater on and off -- the contacts, the silver contacts -- were welded or stuck together. That means that this heater is generating heat. As this heater generates heat, and so those contacts separate. And this heater is what is known as a five hundred block heater. This heater can reach temperatures that if they're outside of the heater -- in other words, the air coming out of it can be in excess of 575 degrees. The heat that is around the aluminum tube which serves as the boiler for the heating element reaches temperatures in excess of 770 degrees. Those are temperatures that are clearly in excess of combustibles that is in and around the electric import here. Specifically, the rug.

JUDGE BRIGHT: I noticed the rug was there. I mean that's an important thing, because otherwise it's speculation, and I want to know why it wasn't the pillow, rather than the rug.

MR. DUNN: Two reasons, Your Honor. Number one, there was testimony from three separate witnesses that when the door was opened -- that front entryway door -- the rug had been pushed up behind the door and onto or near the electric baseboard heater. That's one thing.

The second thing is that hole that we heard about. There was material around the hole that Captain Splitt, another fire investigator from the Fargo Fire Department, took samples of.

He saw material around the hole. He wanted to see whether there were accelerants. He wanted to see what type of material that was. He took samples from around the hole. What he found, unmistakably, was a jute polypropylene rug. That puts that rug right over that hole, and that hole is right underneath the heater. And the reason why Captain Freeman never found the rug after the fire was because most of the rug burned in the fire.

JUDGE BRIGHT: Well, let me ask you a question here. The fact that it may have started in the heater doesn't establish your case. You have to show that this heater was defective, first, and you can't show the heater was defective merely because there was a rug laid over it. What was the defect in the heater? I'm still trying to figure that out.

MR. DUNN: The defect in the heater, Your Honor, was the fact that the regulating thermostat's contacts welded. This heater started up --

JUDGE BRIGHT: Well, when you say "welded," you mean they welded without heat?

MR. DUNN: Yes, Your Honor. That's the way it started. These contacts usually come together and turn the heater on. What happened is these contacts welded together. There was actually material --

JUDGE BRIGHT: Before the fire or after the fire?

MR. DUNN: Before the fire, Your Honor. That's what caused the fire.

JUDGE BRIGHT: And they were open after the fire.

MR. DUNN: They were open after the fire; that is correct. And here's the reason why: The contacts came together and this heater started to heat. The rug is over the heater. The rug blocks the heat from dissipating. This is a convection heater. The heat rises. But now it's being knocked back down into the heater. The petroleum-based glue acts as

an accelerant beneath the linoleum -- the linoleum, and it's going to the subfloor. That heats up. We've got temperatures inside the heater in excess of 775 degrees.

JUDGE BRIGHT: Well, then the contacts welded together because they were serrated? Is that your theory?

MR. DUNN: That is one of the issues, Your Honor. There are basically three issues when it comes to the regulating thermostat. Number one is serrations. "Serrations" simply mean the grooves in the contacts. Basically, what it is is mountains and valleys. There are eight of them. That does not provide for a good mating surface because you've got distance between the two contacts. It promotes particles. It promotes what is called material transfer. What I mean by that, in Dr. Lazarowicz's testimony that they supplied -- that was Exhibit 45 and 53 -- clearly show there was material -- silver -- on this contact, that was transferred to this contact. It had literally pulled material away from that, and the reason why the contact was found separated was because, when the fire got going, obviously it raised all of the temperature in that area; the contacts got to this point of about 850 degrees, which allowed them to become softer and molten, and that's why they split apart. That's why they were separated at the time that they were found.

JUDGE BRIGHT: Well, tell me very simply what your theory of liability is; not where the fire started. What's the theory of liability?

MR. DUNN: The theory of liability, Your Honor, is that these contacts welded and started the fire, and that fire spread through --

JUDGE BRIGHT: Well, what was the defect in the contacts? That they were serrated?

MR. DUNN: That is one of the issues. The serration is --

JUDGE BRIGHT: Tell me where your right to collect is against the Marley heater.

MR. DUNN: There was a defect in the regulating thermostat at the time. Number one is serrations. Number two, there was a spring arm that allowed the contacts to spring open and close. There was also -- it also involves the plastic cover on the housing in that area. We claim, Your Honor, that that regulating thermostat was defective because of the serrations, because of the way it mated. It did not mate properly. It only mated in one part of the contact, and that allowed -- I'm sorry, Your Honor -- that allowed only a small surface of the contact to actually funnel the electricity. It's similar to if you have a large hose and you've got water running through it. You might have just a trickle of water running through it. But if you have a small hose with the same amount of water, the same pressure, all of that is directed to one small area.

JUDGE BRIGHT: Doesn't it really come down to this: That you're saying that if this fire started in the heater, the heater had to be defective? If it started in the heater, the heater was said not to -- not to -- not to have started the fire, and if it -- the fire started there, that's all you have to prove?

MR. DUNN: This is a product liability case, Your Honor. It's a strict product liability case. If we prove that this product did not work as it was intended or designed, that is the course of liability.

JUDGE MAGILL: I thought your expert originally in his deposition testified with respect to serrations; that after he was shown an exemplar heater, that it was perfectly normal that it had serrations in it, he backed off that theory.

MR. DUNN: Your Honor, that's my fault. And here's why: As part of this case, really, everyone wanted to look at the Ferguson contacts -- that's the exemplar contacts -- at the

same time. So the parties gathered in Chicago and were to take a look at these furnace exemplar contacts at the same time. Mr. Lazarowicz had seen the Weisgram contacts. He obviously had not seen the Ferguson contacts. He was shown them, and then, literally 30 minutes later, he was asked to testify about the differences and similarities in between the Weisgram contacts and the Ferguson contacts. I put him in a bad spot. That wasn't fair.

What Mr. Lazarowicz wanted to do was examine those contacts under the same circumstances, with an electron and stereoscopic microscope, to compare them, to do a fair analysis. He was not able to do it with literally 15 people standing around him and then being pestered about his opinions. And that was the reason why there seemed to be some inconsistencies in Mr. Lazarowicz's -- his opinion, because he just wasn't given the same opportunity to review the Ferguson contacts as he was the Weisgram contacts. And that's my fault. And we fixed it with a supplemental report.

JUDGE MAGILL: One further question --

MR. DUNN: You bet. Sure.

JUDGE MAGILL: In our Scheels Hardware & Sports case, it is critical in a product liability case that there must be a defect which existed when the product left the manufacturer, and -- so what is the defect 15 years earlier when this product was manufactured?

JUDGE MAGILL: Here is the defect, Your Honor. We've got a heater --

JUDGE MAGILL: I take it it worked perfectly well for 15 years.

MR. DUNN: Absolutely, Your Honor.

JUDGE MAGILL: For 15 North Dakota winters.

MR. DUNN: No question about that. The defect exists in that -- in all this case, it all comes down to that regulating

thermostat, the regulating contacts. With these serrations, coupled with the spring tension in that spring arm, coupled with the fact that these surfaces were not mating properly, it made it very likely that when this heater turned on and off and on and off and on and off, there would be a time when those contacts could not separate. This was simply -- from our perspective, this was simply a matter of time. As soon as this particular heater had cycled a certain number of times --

JUDGE BOWMAN: Which one of your experts testified and gave an opinion that this is the reason they either failed --

MR. DUNN: That would be Mr. Lazarowicz, Your Honor. He talked about the cycling of this particular heater, and the fact that, again, it goes back to its a combination of the serrations, the spring arm mechanism, the non -- the nonmating surfaces.

JUDGE MAGILL: But he said there were two temperature controls.

MR. DUNN: Right.

JUDGE MAGILL: There was the high-level control and then there was a thermostat.

MR. DUNN: Correct.

JUDGE MAGILL: He said that either one of them would have shut the heater off.

MR. DUNN: Correct.

JUDGE MAGILL: He also testified that the high limit control was not defective.

MR. DUNN: That's correct, Your Honor. We never said -- and, again, this goes to the fact that the parties seem to be talking about each other. We never said that the high limit control failed. What it did is it worked too late.

And here is why we say that. This particular high limit control is designed to shut off the heater when temperatures in and around the heater reach 190 degrees. The testing that was

done by Dr. Ogle in this case was spectacular for us. It was a real bonus, because when he did his testing, he found in a normally operated heater, that it would reach temperatures of in excess of 450 degrees from where it would shut off. If it would shut off at 190, as it was designed to do, it should have shut the heater off at roughly 200 degrees. But it was reaching temperatures in excess of 400 and 450 degrees before it shut the heater off, and that led us to believe that, again, the high limit control did not fail; it simply worked too late after the fire started.

Another thing that the clerk brought up earlier, and this goes to Marley Company's explanation of that hole in the floor and (inaudible) at the same time. Here was (inaudible) the same situation.

It fails because of two particular reasons. Number one, Dan Freeman was in that house on December 30th, 1993, literally 15 minutes after that fire was put out. Dan Freeman saw that cushion, that middle cushion on that couch. That's the same cushion that Dr. Ogle said had been taken off of the couch and moved not outside, not put somewhere else, but literally behind the front door, on top of the heater. That's the only way that you could put a hole in that floor, is that polyurethane couch --

JUDGE BOWMAN: But here's something I don't understand. The couch was pretty much all burned up. There had to be (inaudible), whether there was another cushion there or not.

MR. DUNN: The photographs are somewhat difficult to look at and figure out because of the angles; but Captain Freeman actively looked whether this was a careless cigarette fire. He looked for indications of that. In other words, he looked at the couch, and --

JUDGE BOWMAN: But it was all burned up. So what did he know from that?

MR. DUNN: And, Your Honor, perhaps looking at the photographs, you might come to that conclusion; but Dan Freeman knew that that couch cushion was there because he checked for it at the time.

JUDGE BOWMAN: There might have been a photograph showing the position.

MR. DUNN: Well, again, that's a different interpretation. Obviously, we think that the couch cushion is there as shown in the photographs. They disagree with us. I'm not sure if the Court does. But the only eyewitness there that can actually testify whether that couch cushion was there saw it and said it was.

And the second thing that's important about Dr. Ogle's opinion is that there was no evidence whatsoever of polyurethane foam, which is the material in the couch cushion, in that entryway. Remember Captain Splitt. He's the guy that took samples around that hole. He didn't find any polyurethane foam. He was looking for it. He would see it. It's a very distinctive charring. You'd know it if it was there. I asked Captain Splitt that. "Did you see any of that?" "Absolutely not." I asked Freeman: "Did you see any foam there?" "Absolutely not." We asked every witness. We took a lower cause -- this is a hole in a five-inch plank of wood. This shows that that fire was burning very hot and very long in that spot. We looked beneath the hole. There was a closet beneath the hole. "Was there any evidence of polyurethane foam beneath the hole?" The testimony was "no." You have to throw out the careless cigarette theory because it just doesn't stand up.

But in terms of the -- the real testimony that's important, I think, is the Daubert analysis, and that is two things; number

one, the relevancy of these people's opinion as experts; number two, their reliability. They never questioned the relevancy. Nobody disputes that this testimony of these experts were relevant to this case. They challenged the reliability.

JUDGE BOWMAN: When you say "expert," was Captain Freeman an expert?

MR. DUNN: I don't know whether Captain Freeman was an expert, Your Honor. He was a fact witness. He testified about his observations. But keep in mind that this man's job was to figure out why that fire started. His testimony necessarily involved his opinion in explaining how he determined it wasn't a fire in the couch and it was in that baseboard heater. And it also --

JUDGE BOWMAN: What was his theory, then, of how the fire got from the heater up to the couch?

MR. DUNN: The heater -- as you walk into that entryway, the heater is on your left down here. The main level is roughly about shoulder level, and you can literally touch the walls from between the heater and the couch.

JUDGE MAGILL: From seven feet.

MR. DUNN: It's roughly seven feet; correct, Your Honor, from that point, because you have to measure it at an angle. What Captain Freeman also saw when he was there, he said that there was a wood trim along that main level. That was burned. He also looked at the back of the couch. And that's where the photographs become important. The back of the couch was totally burned away. What that means was that that flaming fire in that entryway was literally reaching around and over the door area and it was getting at the wood trim, and it got up to -- got up in back of that couch, and that's how there was migration. We don't dispute the fact that Bonnie Weisgram died from carbon monoxide from a fire in

that couch. No dispute about that. The dispute is about how the initial fire started. That fire started in that heater, and it was defective.

JUDGE MAGILL: Well, he also testified, you know, that the two controls must have been defective.

MR. DUNN: That's another reason, Your Honor. That was Mr. Lazarowicz. I guess I was talking about Dolence and Freeman in terms of fire cause.

JUDGE MAGILL: Dolence testified.

MR. DUNN: Dolence did not -- Dolence was not put there to talk about the mechanics of the failure. That was Lazarowicz's job.

JUDGE MAGILL: But his opinion differed -- (inaudible).

MR. DUNN: He did, Your Honor. He said -- after he reviewed it, bottom line, he said the fire was caused by this electric baseboard heater based upon his fire analysis. He was never asked by the Fargo Fire Department to explain what was defective, what went wrong. He was asked, "Did this heater start that fire?" He answered that question, "Yes, it did." And when we had to get into explaining why, that's when Lazarowicz came in with his expertise in metallurgy and the fact that these contacts were welded. And, again, I don't mean to confuse the issues here. We're not claiming that there was a design problem in the case. What we're saying is that that heater -- Bonnie Weisgram's heater -- was defective, and that's what the jury found.

JUDGE BRIGHT: What did you say, again?

MR. DUNN: We're not claiming that there was necessarily a design defect for all of these heaters. What we're saying, that our focus was on finding that Bonnie Weisgram's heater was defective; that Bonnie Weisgram's heater started

the fire. That's all we cared about. That's all the focus was on.

JUDGE BRIGHT: Okay. Thank you, Mr. Dunn.

MR. DUNN: Thank you, Your Honor.

CERTIFICATE OF COURT REPORTER

I HEREBY CERTIFY that the foregoing is a true and accurate transcript of the audiotape recording of oral argument had before The United States Court of Appeals for the Eighth Circuit on November 16, 1998 in Case No. 97-3735, Chad Weisgram, et al., Appellees, v. Marley Company, Appellants.

Dated this 11th day of December, 1999.

/s/_____
Alvin T. Emineth
Registered Diplomate Reporter